Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant To Section 332(c)(7)(B)(v) of the Communications Act of 1934	)	WT Docket No. 97-~~197~~ 192
	)	
Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation	)	ET Docket No. 93-62
	)	
Petition For Rulemaking of the Cellular Telecommunications Industry Association Concerning Amendment of the Commission's Rules To Preempt State and Local Regulation of Commercial Mobile Radio Service Transmitting Facilities	)	RM-8577 -

REPLY COMMENTS OF NEXTEL COMMUNICATIONS, INC.

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Date: October 24, 1997

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I. INTRODUCTION

Pursuant to Section 1.415 of the Rules of the Federal Communications Commission ("Commission") and the Commission's Notice of Proposed Rule Making in the above-referenced proceeding,1/ Nextel Communications, Inc. ("Nextel") respectfully submits these Reply Comments on the Commission's proposals regarding federal preemption of state and local authority over Radio Frequency ("RF") emissions.2/

1/ Second Memorandum Opinion and Order and Notice of Proposed Rule Making, WT Docket No. 97-197, released August 25, 1997 ("NPRM").

2/ 47 U.S.C. Section 332(c)(7)(B)(iv).

Nextel files these Reply Comments to support the following:

(1) Section 332(c)(7)B)(iv) of the Communications Act preempts state and local authority to require independent studies, tests or analyses regarding a carrier's RF emissions at a proposed site;

(2) carriers satisfy their RF evidentiary obligations by providing state and local governments (a) a certified statement of RF emissions compliance for categorically excluded facilities; or (b) the same supporting evidence made available to the Commission for non-categorically excluded sites;

(3) a "final action" from which carriers can seek Commission relief includes siting denials based on RF considerations by local/state authorities for which local/state administrative appeals are not exhausted;

(4) a "failure to act" must be determined on a case-by-case basis, but in no case does it require awaiting a zoning or siting decision for more than 90 days; and

(5) the burden of proof is on state/local authorities to establish that a carrier's site in not in compliance with federal RF emission standards.

II. DISCUSSION

A. State/Local Governments Are Preempted From Requiring Independent Studies Or Tests Regarding RF Emissions Compliance

Pursuant to Section 332(c)(7)(B)(iv) of the Communications Act of 1934,

> "No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities, on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions."

The effect of this provision is to eliminate RF emissions concerns from the scope of local and state authorities' zoning and siting considerations when reviewing applications for wireless telecommunications tower sites -- to the extent the wireless facilities are in compliance with federal RF emissions regulations.

To permit state and local governments to require any formal showing by the carrier of RF compliance as a condition to siting/zoning approval obviates the plain meaning of Section 332(c)(7)(B)(iv) preempting state and local jurisdiction over Commission-compliant RF emissions of wireless facilities.3/ If Congress had intended for state and local zoning authorities to have discretion to specify RF requirements, *e.g.*, showings, tests, analyses, or other data, to establish compliance with the federal rules, it would have so specified. Rather, Congress recognized that the Commission should establish consistent RF emissions requirements for personal wireless facilities, and that carriers are required to fulfill them prior to commencing service at a particular site. Thus, states and localities are required to rely upon the findings of the Commission, rely upon the statements and showings made to the Commission by the carrier (under penalty of perjury), and allow the construction of the facility to the extent it is otherwise acceptable.

State and local authorities have an obligation to protect the health and safety of their communities. However, to the extent a wireless telecommunications carrier is complying with federal

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3/ This applies, in particular, to the Commission's proposed interim "guidelines" governing categorically excluded sites. NPRM at para. 146. This proposal is nonsensical in that it not only obviates the Congressional preemption of RF emissions issues, but it also places a higher evidentiary burden on those sites that are "categorically excluded," *i.e.*, by definition, no threat to public health and safety. *See* Comments of GTE Service Corp. ("GTE") at p. 7. These guidelines, as GTE points out, could lead to situations where the Commission and the state/local government simply disagree over the RF concerns, thus resulting in further buildout delays.

guidelines limiting RF emissions (based on considerations which include the health and welfare of citizens in and around the telecommunications site), the health and public safety of local citizens is being protected, and state and local authorities have no authority to challenge that carrier's siting or zoning application on RF compliance grounds.

Confirming a carrier's compliance with federal RF emissions standards does not mean that a state or local government can require the carrier to re-establish compliance. Rather, the state or local government has the right only to confirm what the carrier has already established with the Commission. If the site is categorically excluded,4/ the carrier should be required to do no more than provided written confirmation that the site is well within RF emission safety standards.5/ If the site is not categorically excluded, state or local governments are not entitled to ask for anything more than the RF emissions information available to the Commission.6/

B. Nextel Supports the Commission's Proposed "Final Action" and "Failure To Act" Definitions

Section 332(c)(7)(B)(v) provides that "[a]ny person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause

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4/ These are sites that, due to their significant height above ground level or their low operating power, are excluded from conducting routine Commission RF emissions evaluations.

5/ *See* Comments of AT&T Wireless Services, Inc. ("AT&T Wireless") at p. 2.

6/ Comments of AT&T Wireless at p. 5.

(iv) [the preemption of local authority over RF emissions] may petition the Commission for relief."7/ Nextel agrees with those commenters stating that a "final act" is an adverse decision that may be subject to local and/or state administrative appeals.8/ Once a state or locality has improperly relied on RF concerns as a basis for an adverse decision, a carrier should not be required to follow that decision through the labyrinth of state and local appeals boards -- potentially considering and reconsidering the RF issue -- before seeking relief from the Commission. Congress reserved the RF issue exclusively for the Commission; therefore, as soon as it has been improperly considered by a state or local government, the Commission has the authority to rectify the situation.

With regard to a "failure to act" in a manner inconsistent with the preemption of local authority over RF emission, Nextel agrees that specific conditions, facts and circumstances can redefine the limits of reasonableness from locality to locality. Therefore, a "failure to act" should be determined on a case-by-case basis. Nonetheless, carriers must have some assurance that a given period of time without action equates to a state or local

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7/ 47 U.S.C. Section 332(c)(7)(B)(v).

8/ *See, e.g.*, Comments of GTE at p. 3; Comments of Southwestern Bell Mobile Systems, Inc., Southwestern Bell Wireless, Inc. and Pacific Bell Mobile Services ("Southwestern Bell") at pp. 2-3. Nextel also agrees with Southwestern Bell that "final actions" should not be limited to site-specific decisions. Rather, a state or local rule of general applicability regulating sites based on RF should be subject to immediate review by the Commission. *Id.* at p. 3.

government's failure to act, thus permitting the carrier to seek relief at the Commission. Without such guidance, carriers cannot determine when a local zoning authority is holding it hostage, thereby necessitating action by the Commission under section (iv).

Nextel agrees with the Cellular Telecommunications Industry Association ("CTIA") that the expiration of 90 days, where RF issues are under consideration by the state or local zoning/siting authority, without a final decision is unreasonable.9/ Siting and zoning bodies process zoning applications -- from a plethora of companies and individuals for a number of different uses -- every day. Therefore, their knowledge and expertise should be sufficient to take action within 90 days.10/

C. The Commission Should Presume RF Emissions Compliance When Reviewing State/Local Actions

Nextel supports the Commission's tentative conclusion that it should presume a carrier's compliance with federal RF emissions requirements.11/ This is consistent with Congress' conclusion that state and local authorities are preempted from making zoning/siting decisions based on RF concerns, to the extent the carrier is complying with the Commission's RF requirements. Should

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9/ Comments of CTIA at p. 5.

10/ In the Commission's proceeding regarding unreasonable moratoria, Nextel supported a 90-day period as the limits of reasonableness for a state or local government's moratorium. Comments of Nextel, filed September 11, 1997, in FCC 97-264, at p. 7. If authorities can revamp their siting/zoning rules and regulations within 90 days, they can certainly act on individual applications within that time period.

11/ Comments of GTE at p. 11; Comments of Southwestern Bell at p. 9.

a state or local government seek to regulate a carrier's placement of facilities based on RF considerations, it would first be required to show that the carrier is not in compliance. The burden of proof, therefore, resides with the state or local government; not the carrier.12/

III. CONCLUSION

Congress preempted state and local authority over RF concerns related to the placement of wireless telecommunications facilities, to the extent those facilities are complying with federal RF requirements. Allowing states and localities to require additional showings of RF compliance duplicates regulation, delays system

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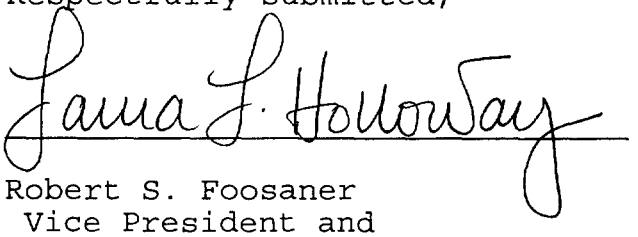
12/ Additionally, Nextel supports GTE's position that the carrier is entitled to begin construction of a site while the RF issue is pending before the Commission or a court. The carrier would simply bear the risk that its site is later determined not to be complying with federal RF requirements, and would be required to bring it into compliance immediately.

buildout and is facially inconsistent with the express Congressional resolution of this matter for wireless facilities siting.

Respectfully submitted,



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